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March 13, 2014

VIA ECF

The Honorable Chief Judge Loretta A. Preska
Daniel Patrick Moynihan United States Courthouse
Southern District of New York
500 Pearl Street, Room 2220
New York, NY 10007-1312

Re: *In re Digital Music Antitrust Litig.*, No. 06-md-1780 (S.D.N.Y.)

Dear Judge Preska:

We respectfully submit this letter on behalf of all plaintiffs to request a pre-motion conference pursuant to your Honor's Individual Practice Rule 2.A. regarding pre-motion conferences, for plaintiffs' anticipated motion to add and remove named plaintiffs prior to plaintiffs' motion for class certification to the Conformed Third Consolidated Amended Complaint ("Complaint") pursuant to Rule 21 of the Federal Rules of Civil Procedure.

I. Introduction

Pursuant to Rule 21, plaintiffs respectfully seek leave to add the following representative plaintiffs to the Complaint, filed August 31, 2011: Shawn Sellers, Cynthia Walker, Ronald Donahue, Alexandra Nordlinger, Randal Schaffer and Michael Newton. Plaintiffs also seek to remove as named plaintiffs the following individuals who had previously been named in the Complaint: Kevin Starr, Cato Thornton, Christopher Michaud, Andrew Edenbaum, Rachael Hall, Mitchell Horton, Keaton Landry and Sheri Clark (Lowery).

Plaintiffs will move for the following individuals to be named as class representatives in the motion for class certification, to be filed March 14, 2014:

Shawn Sellers, Lisa Owens, Matthew Putman, Cynthia Seley, Kathryn Kelly, Michael Newton, Alexandra Nordlinger, Randal Schaffer, David Paschkett, Richard Benham, Cynthia Walker and Ronald Donahue.

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II. Argument

Pursuant to Rule 21, plaintiffs seek leave to add additional class representatives to address any potential standing issues and to provide potential class representatives for certain state sub-classes in their motion for class certification.

Adding additional representative plaintiffs and removing others does not cause prejudice to the defendants or to the Court. The proposed additional plaintiffs have been providing discovery responses to defendants and class certification briefing has not yet occurred. Defendants will have an opportunity to depose the proposed representatives and this relief is being sought within the Court's deadline regarding class certification.

"Where, as here, a proposed amendment adds new parties, the propriety of amendment is governed by Rule 21 of the Federal Rules of Civil Procedure." *Lawrence v. Starbucks Corp.*, No. 08 Civ. 3734 (LTS) (JCF), 2009 U.S. Dist. LEXIS 114909, at *7-*8 (S.D.N.Y. Dec. 10, 2009). "That rule states that a party may be added to an action 'at any time, on just terms.'" *Id.* (quoting Fed. R. Civ. P. 21). "[J]oinder will be permitted absent undue delay, bad faith, prejudice, or futility." *Id.*¹

This rule affords broad discretion to the court in adding and dropping parties; either may be done at any time and under any terms or conditions imposed by the court. *Fair Hous. Dev. Fund Corp. v. Burke*, 55 F.R.D. 414, 419 (E.D.N.Y. 1972). Like Rule 15, Rule 21 has the "same standard of liberality." *FTD Corp. v. Banker's Trust Co.*, 954 F. Supp. 106, 109 (S.D.N.Y. 1997) (citing *Fair Hous. Dev. Fund Corp. v. Burke*, 55 F.R.D. 414, 419 (E.D.N.Y. 1972) and *Expoconsul Int'l, Inc. v. A/E Sys., Inc.*, 145 F.R.D. 336, 337 n.4 (S.D.N.Y. 1993)) (Preska, J.); see also *Duling v. Gristede's Operating Corp.*, 265 F.R.D. 91, 96-97 (S.D.N.Y. 2010).

The amendment to allow the addition of the above-named plaintiffs would be in line with the policy and practice of other courts in this circuit. See, e.g., *Cortigiano*, 227 F.R.D. at 201 (allowing additional plaintiffs to be added). For the same reasons, removing certain previously named plaintiffs is also proper. See, e.g., *First Ebenezer Baptist Church v. Consol. Edison Co.*, 974 F. Supp. 283 (S.D.N.Y. 1997) (granting request to remove named plaintiff from complaint).

¹ While the propriety of adding new parties is generally governed by Rule 21, amendment is also proper under Rule 15(a)(2). Under Rule 15(a)(2), leave to amend should be "freely give[n]." Fed. R. Civ. P. 15(a)(2). "[C]ourts have shown a strong liberality in allowing amendments under Rule 15(a) . . . in recognition of the principle that controversies should be decided on the merits whenever practicable." *United States v. New York*, 82 F.R.D. 2, 4 (N.D.N.Y. 1978).



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III. Conclusion

For the foregoing reasons, plaintiffs respectfully seek leave to add Shawn Sellers, Cynthia Walker, Ronald Donahue, Alexandra Nordlinger, Randal Schaffer and Michael Newton as named plaintiffs and proposed class representatives and to remove Kevin Starr, Cato Thornton, Christopher Michaud, Andrew Edenbaum, Rachael Hall, Mitchell Horton, Keaton Landry and Sheri Clark (Lowery).

Respectfully submitted,

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ALEXANDRA S. BERNAY

cc: All Counsel of Record (via ECF)

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 13, 2014.

s/ Alexandra S. Bernay

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